Supreme Court, U.S.
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No. ____

In the Supreme Court of the United States

TIMOTHY C. TEMPLETON,
Petitioner,

v.

COMMISSIONER OF SOCIAL SECURITY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the standard of review for a district court's decision not to remand under sentence six of 42 U.S.C. § 405(g) should be *de novo* or abuse of discretion.

2. When a treating physician, whose restrictions have been given credit by the administrative law judge, gives a new functional capacity assessment, after the physician's return from military service in a foreign country and after a decision by an administrative law judge in a Social Security disability benefits case, and the new assessment disqualifies the claimant from the range of available jobs identified by the vocational expert in the administrative proceedings, should the district court remand to the administrative process for reconsideration under sentence six of 42 U.S.C. § 405(g).

PARTIES TO THE PROCEEDING

Petitioner

Petitioner, Timothy C. Templeton, is an individual citizen of the United States. Mr. Templeton brought this suit, after exhausting the administrative process, seeking an award of social security disability benefits under Titles II and XVI of the Social Security Act. Mr. Templeton was the Petitioner in the administrative proceedings, the Plaintiff in the District Court, and the Appellant in the Sixth Circuit Court of Appeals. Mr. Templeton is an individual and not a corporation, and thus has no corporate disclosure to make under S. Ct. R. 29.6.

Respondents

Respondent Commissioner of Social Security is an officer of the United States of America. Respondent was the Commissioner of the administrative agency before which the administrative proceedings in this matter were conducted, the Defendant in the District Court, and the Appellee in the Sixth Circuit Court of Appeals.

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Petitioner respectfully petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Sixth Circuit(App. A at 1a) is not reported. *See* 2007 WL 413906 (6th Cir., February 8, 2007). The Trial Court's order denying the Plaintiff's Motion for Summary Judgment (App. B at 13a) is not reported. The District Court order denying the Plaintiff's Motion to Alter or Amend (App. D at 21a) is not reported.

STATEMENT OF JURISDICTION

The decision of the United States Court of Appeals for the Sixth Circuit was entered February 8, 2007. (App. A at 1a.) This petition is filed within ninety days of the entry of that judgment/opinion. S. Ct. R. 13(1).

The District Court had original jurisdiction in this matter under 28 U.S.C. § 1331, 42 U.S.C. § 405(g), and 42 U.S.C. § 1383(c)(3).

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the following statutory provisions:

United States Code, Title 42, Section 405(g), which provides in part (the first and sixth sentences):

Any individual, after any final decision of the Commissioner of Social Security made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Commissioner of Social Security may allow.

* * * *

The court may, on motion of the Commissioner of Social Security made for good cause shown before the Commissioner files the Commissioner's answer, remand the case to the Commissioner of Social Security for further action by the Commissioner of Social Security, and it may at any time order additional evidence to be taken before the Commissioner of Social Security, but only upon a showing that there is new evidence which is material and that there is good cause for the failure to incorporate such evidence into the record in a prior proceeding; and the Commissioner of Social Security shall, after the case is remanded, and after hearing such additional evidence if so ordered, modify or affirm the Commissioner's findings of fact or the Commissioner's decision, or both, and shall file with the court any such additional and modified findings of fact and decision, and, in any case in which the Commissioner has not made a decision fully favorable to the individual, a transcript of the additional record and testimony upon which the Commissioner's action in modifying or affirming was based.

STATEMENT OF THE CASE

The Plaintiff filed this action on July 20, 2005, seeking review of an unfavorable decision by the Commissioner of Social Security regarding social security disability benefits. (App. A at 3a.)

The District Court had original jurisdiction in this matter under 28 U.S.C. § 1331, 42 U.S.C. § 405(g), and 42 U.S.C. § 1383(c)(3).

The parties filed cross motions for summary judgment. (App. B at 13a.) The District Court denied the Mr. Templeton's Motion for Summary Judgment and granted the Commissioner's Motion for Summary Judgment. (App. B at 18a; App. C at 19a.) The District Court denied Mr. Templeton's motion to alter or amend the order granting the Commissioner summary judgment. (App. D at 23a.)

Mr. Templeton timely appealed to the United States Court of Appeals for the Sixth Circuit. (App. A at 1a-3a.) The Sixth Circuit affirmed the decision of the District Court. (App. A at 11a-12a.)

In both the District Court and the Sixth Circuit, Mr. Templeton argued that the District Court should have remanded his case to the Social Security Administration for consideration of newly produced evidence, under sentence six of 42 U.S.C. § 405(g). (*See* App. A at 10a; App. B at 16a.)

Plaintiff's treating neurologist, John Raff, M.D., provided extensive medical treatment for Mr. Templeton in 2004, and Dr. Raff's records were included in the materials reviewed by the administrative law judge. (*See* App. A at 4a-6a.) Dr. Raff entered a period of active military service in 2004, and

served in Afghanistan from May 2004 to May 2005. (App. A at 6a; App. E at 25a-26a.) Upon his return from Afghanistan, Dr. Raff completed a new, more restrictive functional capacity assessment; Mr. Templeton submitted this new assessment to the Appeals Counsel and the District Court. (App. E at 24a-26a.)

The District Court and the Sixth Circuit both refused to consider the medical report of Dr. Raff from May 2005. (App. A at 10a-12a; App. B at 16a-18a; App. D at 21a-22a.)

Mr. Templeton now seek review by this Court as to the standard of review regarding the District Court's denial of a remand under sentence six of 42 U.S.C. § 405(g) and the proper standard for applying the materiality requirement of sentence six of 42 U.S.C. § 405(g).

REASONS FOR GRANTING THE PETITION

A conflict exists between the decisions of certain United States Courts of Appeal regarding the standard of review for a district court's denial of a "sentence six" remand under 42 U.S.C. 405(g).

This petition requests this Court to accept review of this case in order to resolve an important inter-circuit split and intra-circuit disagreement or uncertainty regarding the standard of review for judicial remand of cases to the administrative process under sentence six of 42 U.S.C. § 405(g).

The Sixth Circuit noted in its opinion in this matter that an intra-circuit uncertainty exists in the Sixth Circuit regarding the appropriate standard of review of a decision to remand or not remand a case to the administrative process from the

district court. (App. A at 12a [n. 3].) Two different panels within the 6th Circuit have noted the differing standards of review, abuse of discretion or *de novo*. *See Perkins v. Apfel*, 14 Fed. Appx. 593, 598-599 (6th Cir. 2001) (abuse of discretion); *Cranfield v. Comm'r, Soc. Sec.*, 79 Fed. Appx. 852, 857, 858-859 (6th Cir. 2003).

In *Cranfield*, the Sixth Circuit stated:

> There is a split in the circuits with regard to the second issue in this appeal (whether the post-hearing medical evidence was material and whether Ms. Cranfield had good cause to submit it after the ALJ's decision). *See Thomas v. Sullivan*, 928 F.2d 255, 260 n.1 (8th Cir.1991)(identifying conflict between circuits, but applying an abuse of discretion standard). This Circuit has not established whether such an issue is subject to *de novo* review or reviewed for an abuse of discretion. Since Ms. Cranfield's argument would fail under either standard of review, the matter need not be resolved here.

79 Fed. Appx. at 857.

An intercircuit split exists on this point of law: whether a refusal to order a "sentence six" remand to the administrative process will be judged by a *de novo* standard or an abuse of discretion standard. *See Thomas v. Sullivan*, 928 F.2d 255, 260 n.6 (8th Cir. 1991); *Geigle v. Sullivan*, 961 F.2d 1395, 1397 (8th Cir. 1992); *Sample v. Shalala*, 999 F.2d 1138, 1144 (7th Cir. 1993); *and*, *Mayes v. Massanari*, 276 F.3d 453, 461-462 (9th Cir. 2003).

This Court should accept review of this matter in order to resolve that split.

The Sixth Circuit indicated that the choice of the standard of review would not matter in this case. (App. A at 12a n. 3; *see also* App. A at 10a-11a.) The conclusion that the choice of standard of review should not be upheld, however, because the Sixth Circuit also noted that the May 2005 "assessement [by Dr. Raff] reflected greater exertional restrictions that would not be consistent with light work." (App. A at 11a.)

The District Court and the Sixth Circuit both indicated that consideration of the additional evidence likely would not matter to the administrative law judge, because the administrative law judge would want an explanation from Dr. Raff regarding the more physically restrictive opinion given by Dr. Raff in his May 2005 evaluation than in his previous evaluation. (App. A at 11a; App. B at 16a-17a; App. C at 21a-22a.)

The Petitioner respectfully asserts that the courts below speculated about what the administrative law judge would or would not have done; the decision about how to view the evidence that indisputably placed restrictions upon Mr. Templeton that would have disallowed him from performing the jobs that the administrative law judge found him able to perform (and available), the only jobs the vocational expert identified in her testimony as matching Mr. Templeton's restrictions and being available, (*see* App. A at 6a-7a, 11a; App. B at 17a-18a; App. D at 22a), should be made by the administrative law judge pursuant to a remand under 42 U.S.C. § 405(g) and the decision to remand should be reviewed under a *de novo* standard. The administrative law judge had previously credited the opinion of Dr. Raff regarding Mr. Templeton's physical limitations, and very

reasonably could have credited Dr. Raff's May 2005 evaluation (or at least might not have discounted it in the manner the courts below seemed to believe would have been done).

CONCLUSION

For the reasons set forth in this petition, a Writ of Certiorari should be granted and this case brought before this Court on its merits. If a Writ of Certiorari is granted, then Petitioner prays that the judgment of the Sixth Circuit Court of Appeals be reversed.

Respectfully submitted,

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